the open video system is providing service. Negotiation with the local franchising authority will, we believe, accomplish this goal.

(2) Open Video System Operator PEG Obligations Satisfied through Connection and Cost Sharing

141. Although we believe that negotiation is the best way to establish the appropriate PEG access obligations for each open video system operator, we recognize that the parties may be unable to reach agreement. We therefore believe it is necessary to have a default mechanism for establishing PEG access obligations. If the open video system operator and the local franchising authority are unable to come to an agreement, we will require the open video system operator to satisfy the same PEG access obligations as the local cable operator.[327] We believe this can be accomplished by connection to the cable operator's PEG access channel feeds and by sharing the costs directly related to supporting PEG access, including costs of PEG equipment and facilities, and equipment necessary to achieve the connection.[328] We also determine that, under these circumstances, in order to comply with the statutory directive that to the extent possible the obligations be no greater or lesser than those imposed on cable operators, the open video system operator must provide the same amount of channel capacity for PEG access as the

[327]CATA Comments at 3-4; City of Arvada Comments at 1; Continental Comments at 5; Greater Metro Cable Comments at 1; State of New York Comments at 9; Texas Cities Comments at 8. Access Houston, Access Sacramento, Access Tucson, BNN TV3, Cambridge Community TV, Chicago Access, Cincinnati Community Video, City of Pocatello, PG County Community TV, Miami Valley, Minneapolis Telecom. Network, Multnomah Community TV, North Dakota Community TV, Plymouth Channel 3, D.C. Public Access Corp., Quote . . . Unquote, and Schopeg Access support the comments of Alliance for Community Media, et al., National League of Cities, et al., and State of New Jersey Ratepayer Advocate and urge the Commission to, at a minimum, implement PEG access to open video system platforms in a way which matches implementation of PEG on cable systems. Access Houston Reply Comments at 1; Access Sacramento Reply Comments at 1-2; Access Tucson Reply Comments at 1; BNN TV3 Reply Comments at 1-2; Cambridge Community TV at 1; Chicago Access Reply Comments at 1; Cincinnati Community Video Reply Comments at 1-2; City of Pocatello Reply Comments at 1; PG County Community TV Reply Comments at 1; Miami Valley Reply Comments at 1; Minneapolis Telecom. Network Reply Comments at 1; Multnomah Community TV Reply Comments at 1-2; North Dakota Community TV Reply Comments at 1-2; Plymouth Channel 3 Reply Comments at 1-2; D.C. Public Access Corp. Reply Comments at 1-2; Quote . . . Unquote Reply Comments at 1; Schopeg Access Reply Comments at 1

[328]Regarding connection with the cable operator's PEG facilities, *see* MFS Communications Comments at 27; U S West Comments at 19; Telephone Joint Commenters Reply Comments at 27; Bartholdi Cable Reply Comments at 11; State of New Jersey Bd. of Pub. Util. Comments at 11-12; State of New Jersey Ratepayer Advocate Comments at 4; Alliance for Community Media, et al. Comments at 9; City of Olathe Comments at 7-8; City of Seattle Comments at 1; MFS Communications Reply Comments at 14. Regarding cost sharing, *see* City of Indianapolis Comments at 2; U S West Comments at 19; State of New Jersey Bd. of Pub. Util. Comments at 12-13; State of New Jersey Ratepayer Advocate Comments at 4; Alliance for Community Media, et al. Comments at 9, 35; CCTA Reply Comments at 9; City of Denver Reply Comments at 8; Continental Comments at 6; MFS Communications Reply Comments at 14-15.

local cable operator is required to provide.[329]

142. As stated above, we believe that the cable operator and the open video system operator should share all costs that relate to PEG access, including those for PEG services, facilities and equipment. Section 611(c) permits a cable operator to enforce any requirement in any franchise regarding the provision or use of PEG channel capacity, including provisions for services, facilities or equipment which relate to PEG use of channel capacity.[330] Although NYNEX asserts that Section 611 only authorizes local franchising authorities to require dedication of cable channels to PEG use,[331] we believe that Section 611(c), as applied through Section 653(c), imposes a responsibility on open video system operators to contribute toward PEG services, facilities and equipment to the same extent as the local cable operator.[332] Furthermore, in describing open video system operators' PEG access obligations, the legislative history of the 1996 Act refers to "capacity, services, facilities and equipment."[333]

143. National League of Cities, et al. assert that, if local community needs and interests dictate that the incumbent cable operator must provide an institutional network, then any open video system operator in that community must likewise provide an institutional network.[334] As stated above, Section 611 provides that a local franchising authority may require that channel

---

[329]*See* City of Arvada Comments at 2; Greater Metro Cable Comments at 2; City of Olathe Comments at 9; NYNEX Comments at 17.

In addition, City of Denver contends that (1) PEG services must be allowed to be stipulated in bandwidth and not necessarily in traditional channels to ease the transition from analog to digital, (2) open video systems should set aside both analog and digital capacity so that all types of PEG programming will be able to be delivered to subscribers, and (3) PEG programmers should be allowed to telecast their services so that they are received by subscribers on the same channel on the open video system and the cable system. City of Denver Comments at 6, 9. Although the parties may negotiate each of these items, we believe that, absent an agreement to the contrary, requirements imposed on the open video system operator regarding each of these subjects must track that imposed on the cable operator, in order to ensure that the PEG obligations are no greater or lesser than those of the cable operator. We do not believe that there is sufficient evidence that mandating the location of PEG channels is critical to an open video system operator meeting its PEG obligations.

[330]Communications Act § 611(c), 47 U.S.C. § 531(c).

[331]NYNEX Comments at n.42.

[332]*See* Minnesota Cities Comments at 7-8; National League of Cities, et al. Comments at 34; Michigan Cities, et al. Reply Comments at 38-39; National League of Cities, et al. Reply Comments at 29-30; Alliance for Community Media, et al. Reply Comments at 6; City of Denver Reply Comments at 7-8; Time Warner Reply Comments at 22.

[333]Conference Report at 176.

[334]National League of Cities, et al. Comments at 34; *see also* City of Denver Reply Comments at 13; Michigan Cities, et al. Reply Comments at 39-40. Section 611(f) defines institutional network as a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers. Communications Act § 611(f), 47 U.S.C. § 531(f).

capacity on institutional networks be designated for educational or governmental use.[335] Section 611 does not specifically authorize local franchising authorities to require cable operators to build institutional networks. In applying Section 611 to open video systems under Section 653, the statute requires that we attempt to ensure that the obligations imposed are no greater or lesser than those imposed on cable operators under Section 611. We will therefore not require open video system operators to build institutional networks, although they may, of course, agree to do so. However, if an open video system operator does build an institutional network, the local franchising authority may require that educational and governmental access channels be designated on that network to the extent such channels are designated on the institutional network of the local cable operator.

144. NYNEX asks that open video system operators be allowed to use channel capacity designated for PEG access for other programming when it is not being used for PEG.[336] Section 611(d) directs local franchising authorities to prescribe rules and procedures under which the cable operator is so permitted to use PEG channels. In the interest of keeping open video system operators' PEG access obligations no greater or lesser than those imposed on cable operators, we believe this provision should also apply to open video system operators. Therefore, if, in the absence of an agreement between the open video system operator and the local franchising authority, the open video system operator is meeting its PEG access obligations through matching the obligations of the local cable operator, the open video system operator will be subject to the same rules and procedures regarding alternative use of PEG access channels as those imposed on the cable operator.

145. Several cable and local government commenters believe that requiring connection to the cable operator's facilities would be inequitable or might not satisfy the local community's needs and interests.[337] Many of these parties urge the Commission to require open video system operators to duplicate the PEG channels and facilities provided by the local cable operator.[338] We believe that, absent an agreement to the contrary between the open video system operator, the local franchising authority and/or the cable operator, requiring duplication of the cable operator's facilities may be unnecessary and inefficient. We believe that connection and cost sharing will ease the financial burden on both the cable and open video system operators, without diluting the number and quality of PEG access channels received by the community. We will

[335]Communications Act § 611(b), 47 U.S.C. § 531(b).

[336]NYNEX Comments at 17.

[337]TCI Comments at 18; Time Warner Comments at 25; NCTA Reply Comments at 29; Cablevision Systems/CCTA Comments at 22; Texas Cities Comments at 9; City of Mountain View Comments at 2; City of Denver Comments at 4-5; Continental Comments at 6; City of Olathe Comments at 6-7; Minnesota Cities Comments at 6-7; *see also* NCTA Comments at 34 (asserting that there is no legal basis to require cable operators to interconnect its PEG channel feeds with anyone).

[338]*See, e.g.*, Alliance for Community Media, et al. Comments at 9, 10.

therefore require cable operators to permit open video system operators to connect with their PEG feeds. We will leave how this connection is accomplished to the discretion of the parties, allowing them to take into consideration the exact physical and technical circumstances of the cable and open video systems involved. If the cable and open video system operators cannot agree on how this connection can best be accomplished, the local franchising authority, which we believe will be in the best position to evaluate the most appropriate method of connection for the local community, may decide. In this context, the local franchising authority may require that the connection take place on government property or on public rights of way.

146. With regard to cost sharing, the costs of connection and maintaining PEG services, facilities and equipment shall be divided equitably between the cable operator and the open video system operator. This shall include capital contributions and any other costs or investments directly relating to or supporting PEG access and required by the cable operator's franchise agreement. Capital expenses incurred prior to the open video system operator's connection shall be subject to cost sharing on a pro-rata basis to the extent such investments have not been fully amortized by the cable operator.[339] As an example of how such cost sharing might be appropriately managed, we note that, in order to manage equitably the PEG access obligations of two cable operators which serve different sections of Brooklyn, New York, but support a single public access organization, New York City has established a capital fund to which each operator contributes based upon the number of subscribers it serves in Brooklyn.[340]

147. Telephone Joint Commenters assert that it is clear that the statutory qualifier "to the extent possible" provides the Commission with latitude to fashion a flexible regulatory approach that recognizes the differences between open video and cable systems. They contend that the Commission must apply Title VI obligations "without effectively reimposing local franchise regulation."[341] Telephone Joint Commenters contend that open video system operators must not be required to negotiate with local franchising authorities or local cable operators as a condition of certification. They also assert that open video system operators should be encouraged to employ flexible and workable solutions to achieve the 1996 Act's PEG requirements, e.g, where technically feasible, narrowcasting. According to Telephone Joint Commenters, if the Commission adopts overly restrictive PEG access rules for open video systems, it may hinder the use of new and innovative approaches to providing PEG access.[342]

148. We believe that our approach of allowing the parties to negotiate PEG access obligations in the first instance satisfies these objectives of the Telephone Joint Commenters, and allows the open video system operator and the local franchising authority to employ flexible,

---

[339]*See* State of New Jersey Bd. of Pub. Util. Comments at 12-13

[340]New York City Reply Comments at 10-11.

[341]Telephone Joint Commenters Reply Comments at 24

[342]*Id.* at 27; *see also* USTA Reply Comments at 6

workable solutions to satisfy the operator's PEG access obligations.[343] With regard to Telephone Joint Commenters' assertion that open video system operators must not be required to negotiate, we believe that allowing the open video system operator to connect and to share the cable operator's costs if it cannot reach an agreement does not require open video system operators to negotiate. We do, however, strongly encourage the parties to negotiate an appropriate agreement if at all possible.

149. Minnesota Cities contend that the Commission should authorize local authorities to impose requirements on open video system operators, including PEG access, monetary contributions toward operating costs and capital equipment support, and that open video system operators should be permitted to complain to the Commission if they disagree with the local franchising authority.[344] We do not believe that, absent a mutual agreement, local franchising authorities should be permitted to impose specific PEG access obligations on open video system operators that would exceed those imposed on the local cable operator.[345] In addition, if the parties are unable to negotiate an agreement in the first instance, our default PEG access obligations will apply. We anticipate that these default requirements will minimize the number of disputes over an open video system operator's PEG access obligations if it is unable to reach an agreement with the local franchising authority in the first instance. We recognize, however, that disputes over an open video system operator's PEG access obligations may arise both with and without a negotiated agreement. We believe that, if the open video system operator, the local franchising authority and/or the local cable operator negotiate an agreement regarding PEG access obligations and a dispute arises over the terms of that negotiated agreement, the dispute would be a matter of contractual law and any complaint should be brought in the court of relevant jurisdiction. If the dispute involves an interpretation of our rules regarding the open video system operator's obligations under our default mechanism (i.e., connection and cost sharing), however, we believe that the complaining party should be permitted to file a complaint with the Commission and that our open video system dispute resolution procedures, described below in Section III.G., should apply.

150. Where the open video system operator and the local franchising authority cannot negotiate an agreement regarding PEG access, and the open video system operator is instead satisfying its PEG access obligations by connection and cost sharing with the cable operator's PEG facilities, the open video system operator's PEG access obligations should change to the

[343] *See* Michigan Cities, et al. Reply Comments at 30 (negotiation provides needed flexibility).

[344] Minnesota Cities Comments at 8.

[345] We also will not expand the PEG obligations imposed on open video systems from those imposed on cable operators, as the City of Somerville suggests. City of Somerville Reply Comments at 1-2. We believe we are constrained by the 1996 Act's provision that the obligations imposed be no greater or lesser than those imposed on cable operators.

extent that the cable operator's PEG access obligations change with the franchise renewal.[346] Accordingly, open video system operators should be prepared to adjust their systems to comply with new PEG access obligations as necessary.[347] An open video system operator will not, however, be required to displace other programmers to accommodate PEG channels. Because PEG access channels are expressly exempt from Section 653(b)(1)(A)'s non-discrimination requirement, an open video system operator need not and should not wait until the next three-year reallocation to comply with new PEG access obligations, but should comply with such obligations whenever additional capacity is or becomes available, whether it is due to increased channel capacity or decreased demand for channel capacity.[348]

(3) Establishing Open Video System PEG Obligations Where No Local Cable Operator Exists

151. Where there is no local cable operator and the open video system operator and the local franchising authority cannot agree on appropriate PEG access obligations,[349] we agree with NYNEX that the open video system operator should make a reasonable amount of channel capacity available for PEG access.[350] We also believe that the open video system operator's PEG obligations should include reasonable terms and conditions beyond the provision of mere channel capacity, including support of PEG services, facilities and equipment. We believe that what constitutes a reasonable amount of channel capacity as well as other terms and conditions should depend on whether there used to be a cable franchise agreement in that franchise area. If a

[346]*See* State of New Jersey Bd. of Pub. Util. Comments at 13-14 (if the cable operator negotiates new PEG obligations, the open video system operator's interconnection will be viable without much additional expenditures on the part of the open video system operator, and additional costs can be absorbed by both the cable and open video system operator on a going forward basis); City of Olathe Comments at 5-6 (in light of the fact that cable operators must update their PEG requirements upon renewal of their franchise agreement, open video system operators should also be subject to the PEG requirements contained in the cable operator's renewed franchise agreement); National League of Cities, et al. Comments at 33; National League of Cities, et al. Reply Comments at 32; New York City Comments at 7; New York City Reply Comments at 10.

[347]*See* City of Denver Comments at 6 (the Commission should require that expansion capacity is available on the open video system for the addition of new PEG services as such services are added on the cable provider's system).

[348]*See* NYNEX Comments at n.43; *see also* Section III.C.1.e.(5) above (regarding subsequent changes in demand or capacity).

[349]National League of Cities, et al. assert that there are very few areas without a franchised cable operator, and that potential open video system operators are unlikely to be attracted to those areas, or LECs would have built systems there under the rural exception to the now repealed cross-ownership ban. National League of Cities, et al. Comments at 38. National League of Cities, et al. also assert, and we agree, that an open video system operator may negotiate with local government to establish PEG access obligations even where there is no local cable operator. *Id.*

[350]NYNEX Comments at 17.

franchise agreement previously existed in that franchise area, the open video system operator should be required to maintain the previously existing PEG access terms of that franchise agreement. For instance, if a cable system converts to an open video system, the operator will be required to maintain the previously existing terms of its PEG access obligations.[351]

152. Absent a previous cable franchise agreement or an agreement negotiated between the open video system operator and the local franchising authority, however, we believe that what constitutes a reasonable amount of channel capacity and other terms and conditions should be determined by comparison to the franchise agreements for the nearest operating cable system with a commitment to provide PEG access.[352] We anticipate that this comparison will yield PEG access obligations that are appropriate for the community and, to the extent possible, that are no greater or lesser than those that would have been imposed on a cable operator had there been one in that area.

(4) Provision of PEG Access Channels to All Subscribers

153. We believe that PEG access channels should be provided to all subscribers to the open video system. Congress determined that PEG access channels should be provided to all subscribers in the cable context by including PEG access channels on the basic tier.[353] The provision of PEG channels to all open video system subscribers is therefore important to ensure that the PEG access obligations imposed on open video system operators are "no greater or lesser" than those imposed on cable operators.[354] Commenters have various suggestions for how to assure that all open video system subscribers receive the PEG access channels, including requiring that operators establish the equivalent of a basic programming tier.[355] We, however,

[351]*See* Alliance for Community Media, et al. Comments at 12-13.

[352]*See id.* at 12.

[353]Communications Act § 623(b)(7), 47 U.S.C. § 543(b)(7).

[354]*See* Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A); National League of Cities, et al. Comments at 42; City of Denver Reply Comments at 8.

[355]National League of Cities, et al. Comments at 42; New York City Comments at 8; New York City Reply Comments at 12; City of Seattle Comments at 2; Alliance for Community Media, et al. Comments at 28. Minnesota Cities believes that PEG and must- carry channels should be part of the open video system operator's programming package and available on an a la carte basis apart from other program packages. Minnesota Cities Comments at 11-12. *See also* NCTA Comments at 34 (recommending that PEG be implemented through a channel administrator); Bartholdi Cable Reply Comments at 11 (suggesting that the Commission require open video system operators only to make PEG channels available on their networks); City of Olathe Comments at 11-12 (stating that must-carry and PEG channels should perhaps be available as shared channels that would have to be provided by unaffiliated programmers on the system, at the same price as charged by the open video system operator, and that open video system operators should only be allowed to mandate channel bundling when implementing must-carry and PEG access requirements); Assn. of Public Television Stations Comments at 7 (charging for PEG services would undermine the goal of providing public telecommunications services to all citizens); State of New Jersey Bd. of Pub.

agree with NYNEX that, while PEG, as well as must-carry, compliance is "an inescapable part of an open video system operator's basic responsibility for allocating channel capacity,"[356] open video system operators should have the flexibility to determine how all subscribers will receive PEG access channels, i.e., whether to provide a basic programming tier similar to that provided by cable systems, or to require unaffiliated video programming providers to offer at their expense mandatory services such as PEG access channels to their subscribers.[357] We conclude that the open video system operator is responsible for ensuring that all subscribers receive PEG channels, but that the operator has the discretion to decide how best to accomplish this, given its particular technical configuration and any other considerations. This flexibility will permit the operator to provide PEG access channels in an efficient manner while not diminishing the provision of the PEG access channels to the community.

(5) Open Video System PEG Obligations Where System Overlaps with More than One Franchise Area

154. We also conclude that open video system operators should be subject to PEG access requirements for every franchise area with which its system overlaps. We believe that, despite open video system operators not being subject to franchise requirements, pursuant to Section 653(c)(1)(C), it is appropriate to require open video system operators to comply with these franchise by franchise requirements so that the obligations imposed on the open video system operator with respect to PEG access are "no greater or lesser" than those imposed on cable operators, as required by Section 653(c)(2)(A) of the Communications Act.[358]

155. In addition, from the technical standpoint, as many commenters point out, cable operators whose systems overlap with more than one franchise area are required to configure their systems to comply with the various PEG access obligations of the multiple franchise areas, and open video system operators should be subject to no less.[359] We will require open video system

---

Util. Comments at 14 (contending that PEG channels should be provided to all subscribers whether or not the individual subscriber asks for them, and that, if the Commission does not require a basic service package, PEG channels should be part of the subscriber line-charge).

[356]NYNEX Comments at 18; *see also* Bartholdi Cable Reply Comments at 10-11 (contending that the 1996 Act authorizes the Commission to apply cable PEG requirements only to open video system operators, not to multichannel video programming distributors purchasing carriage, and that such intent cannot be found in the legislative history.)

[357]*See* NYNEX Comments at 18.

[358]*See* Cablevision Systems/CCTA Comments at 24-25; New York City Reply Comments at 9-10.

[359]Alliance for Community Media, et al. Comments at 31-32, Appendix B and Appendix C (including at Appendix C a declaration of Mr. Dale Hatfield stating that, among other things, the distribution by LECs of PEG access channels on less than a state-wide basis is clearly feasible); Cablevision Systems/CCTA Comments at 22; City of Arvada Comments at 1-2; Continental Comments at 6; Greater Metro Cable Comments at 2; Minnesota Cities Comments at 12-13; New York City Comments at 6-7 and New York City Reply Comments at 10 (claiming that

operators to satisfy the PEG access obligations for all franchise areas with which their systems overlap.

(6) Technical Issues

156. We believe that it is unnecessary for the Commission to decide many of the technical issues raised by commenters,[360] as we are permitting open video system operators to negotiate their PEG access obligations in the first instance, including technical requirements. If, however, an agreement cannot be reached, some technical issues regarding connection with the cable operator's PEG facilities may remain to be resolved on a case-by-case basis.

2. Must-Carry and Retransmission Consent

a. Notice

157. Section 653(c)(1) provides that any provision that applies to cable operators under Sections 614 and 615 of Title VI, and Section 325 of Title III, shall apply to open video system operators certified by the Commission.[361] Section 653(c)(2)(A) provides that, in applying these provisions to open video system operators, the Commission "shall, to the extent possible, impose obligations that are no greater or lesser" than the obligations imposed on cable operators.[362]

158. Sections 614 and 615 set forth a cable operator's "must-carry" obligations regarding local commercial and local noncommercial educational television signals, respectively.[363] Cable operators are required to set aside a portion of their capacity for carriage of these local broadcast stations. Section 325 sets forth a cable operator's retransmission consent obligations, generally prohibiting cable operators and other multichannel video programming

---

open video system operators must design their systems to be able to duplicate the cable operators PEG obligations in each franchise area and to comply with all Title VI obligations in each jurisdiction they serve); NYNEX Comments at 17; TCI Comments at 18; Time Warner Comments at 25; State of New Jersey Bd. of Pub. Util. Comments at 11; *see also* City of Olathe Comments at 9; City of Indianapolis Comments at 3; State of New York Comments at 9-10 (claiming that there should be no significant problem with respect to channel capacity for an open video system which covers more than one franchise area); Michigan Cities, et al. Reply Comments at 31-34 (there is not evidence that it is not possible to deliver PEG channels to specific areas).

[360]*See, e.g.*, NYNEX Comments at 17 (the local authority should be responsible for delivering program material on PEG access channels); Telephone Joint Commenters Comments at 28 (PEG programmers should be responsible for making their program feed available for delivery to the open video system headend); Michigan Cities Reply Comments at 37-38 (open video system operators must be responsible for converting PEG signals to a compatible format and transporting it to its headend).

[361]Communications Act § 653(c)(1), 47 U.S.C. § 573(c)(1).

[362]Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A).

[363]Communications Act §§ 614, 615, 47 U.S.C. §§ 534, 535.

distributors from carrying commercial broadcast stations without obtaining the station's consent.[364] Local commercial stations seeking carriage must choose to proceed under the must-carry or retransmission consent requirements.[365] Under must-carry, a station is entitled to insist on carriage in its local market area.[366] Under retransmission consent, the station and the multichannel video programming distributor negotiate the terms of a carriage arrangement and the station is permitted to receive compensation in return for carriage.[367] Because Section 325 applies to television broadcast stations in general, non-local commercial stations may also be carried by a cable system pursuant to a retransmission consent agreement.[368]

159. In the *Notice*, we sought comment on how the must-carry and retransmission consent regulations for cable operators should be applied to open video system operators. Specifically, we sought comment on any technological or administrative differences between cable systems and open video systems that might require the adoption of different obligations. In addition, we asked whether and how open video system operators should be responsible for ensuring that every subscriber receives must-carry channels. We also asked for comment regarding how cable operators whose systems span several relevant regions currently comply with must-carry and retransmission consent requirements, and whether similarly situated open video system operators should be required to act in similar fashion.

b. Discussion

160. Based upon the comments in the record, we do not believe it is necessary to change our must-carry and retransmission consent rules significantly in order to apply them to open video systems.[369] Indeed, several commenters suggested that the Commission simply apply the present must-carry and retransmission consent rules directly to open video system operators.[370]

---

[364]Communications Act § 325, 47 U.S.C. § 325.

[365]Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B).

[366]Communications Act §§ 614(a), 615(a), 47 U.S.C. §§ 534(a), 535(a).

[367]Communications Act § 325, 47 U.S.C. § 325.

[368]*Id.*

[369]*See* Assn. of Local Television Stations Comments at 6, 9-10; Assn. of Local Television Stations Reply Comments at 8; CATA Comments at 3-4; Continental Comments at 5-7; CCTA Reply Comments at 9; MPAA Reply Comments at 11; NBC Comments at 4-5; Time Warner Reply Comments at 21-22; NYNEX Comments at 16; NAB Comments at 12; Telephone Joint Commenters Comments at 28

[370]*See* Assn. of Local Television Stations Comments at 2 (proposing that the must-carry rules be applied "to open video systems in a direct and straightforward manner virtually identical to their application to cable systems"); Cablevision Systems/CCTA Comments at 21 (proposing that the statutory must-carry obligations be applied "to OVS operators just as they are applied to cable operators"); NBC Comments at 4-5 (proposing that the Commission amend all rules regarding broadcast carriage to apply to open video system operators); Telephone Joint Commenters Reply

In light of this evidence, we largely agree that "there are no public policy reasons to justify treating an open video system operator differently from a cable [operator] in the same local market for purposes of broadcast signal carriage."[371]

161. MFS Communications suggests that the manner in which the cable must-carry and retransmission consent rules apply to open video system operators will depend to some extent on the configuration of future networks and the type of programming services offered over these networks.[372] We find, however, that at this time the public interest will best be served by application of the cable must-carry and retransmission consent rules to open video systems, even though future system configurations may require modification of our regulations. If our regulations later become inadequate for open video system operators, we intend to promptly address the problem. For now, we are guided by Congress' directive that we impose obligations that are "no greater or lesser" than the obligations currently imposed on cable operators.[373] We will, therefore, apply the existing cable must-carry and retransmission consent rules to open video system operators.

(1) Must-Carry

162. Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system.[374] Sections 614 and 615 also generally state the number of must-carry stations a cable operator is required to provide.[375] The Assn. of Local Television Stations and NAB suggest that the Commission refrain from prescribing any requirements as to the number of must-carry stations to be carried on an open video system.[376] We believe, however, that in order to apply obligations that are no greater or lesser than those imposed on

Comments at 25 (proposing that the Commission simply codify a general rule requiring adherence with the provisions of subpart D of our rules)

[371]NBC Comments at 4; *see also* Time Warner Reply Comments at 21-22; Tele-TV Reply Comments at 11 n.10. As is discussed below, we will not require open video system operators to fulfill these obligations through the use of a "basic" or "lowest priced" tier as is required of cable operators in Section 76.56(d)(2). *See* 47 C.F.R. § 76.56(d)(2).

[372]MFS Communications Comments at 26-27.

[373]Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A).

[374]Communications Act §§ 614(b)(7), 615(h), 47 U.S.C. §§ 534(b)(7), 535(h).

[375]Communications Act §§ 614(b)(1), (5), 615(b), (e), 47 U.S.C. §§ 534(b)(1), (5), 535(b), (e).

[376]Assn. of Local Television Stations Comments at 4; NAB Comments at 14.

cable operators, we must also apply these requirements to open video system operators.[377] Consequently, we find that the operator of an open video system must ensure that every subscriber on the open video system receives all appropriate must-carry channels carried in accordance with our rules.[378] An open video system operator will be required to fulfill this obligation regardless of whether or not individual subscribers on its system subscribe to the open video system operator's programming package. We do not find it necessary to prescribe the specific methods to be used by an open video system operator to comply with these requirements. We also recognize that certain costs will be associated with providing must-carry channels. These costs may be recovered as an element of the carriage rate.

163. We will not require open video system operators to use a basic tier. Section 653 states that Section 623 generally will not apply to open video system operators.[379] As a result, open video system operators are not subject to Title VI rate regulation and are not subject to Section 623's requirement that a basic tier be provided for each subscriber on the system. Nevertheless, several commenters have urged the use of a basic tier for signals carried in fulfillment of the must-carry requirements.[380] We recognize that cable operators have complied with our must-carry and rate regulation rules through the use of a basic tier, but Section 623's basic tier requirement does not apply to open video systems. We will, therefore, allow open video system operators to comply with our must-carry rules without necessarily using a basic tier. We believe that through the development of different system configurations, open video system operators may discover alternate methods to ensure that subscribers receive all appropriate must-carry channels.[381] We also believe that by simply requiring compliance with our must-carry rules, which provide that subscribers must receive all appropriate must-carry channels, we are imposing obligations that are no greater or lesser than those imposed on cable operators.

164. As a related matter, we agree with the State of New Jersey Ratepayer Advocate that subscribers must have access to any customer premises equipment necessary to receive must-

[377]*See* MPAA Reply Comments at 12. We find that this approach is further supported by the fact that the open video system operator is the only entity who may control how far its system extends and whether its system will serve communities within the ADI of various broadcast stations

[378]*See* ABC Comments at 4-5; Assn. of Local Television Stations Comments at 6; CBS Comments at 9-10; Golden Orange Broadcasting Comments at 2-3; MPAA Comments at 13-14; NAB Comments at 12-13; NBC Comments at 4-5; NYNEX Comments at 17-18; TCI Comments at 17-18; U S West Comments at 19-20; Viacom Comments at 20-21.

[379]Communications Act § 653(c)(1)(C), 47 U.S.C. § 573(c)(1)(C). Section 623 addresses the regulation of cable rates and related matters. Communications Act § 623, 47 U.S.C. § 543.

[380]*See* NAB Reply Comments at 4; National League of Cities, et al. Comments at 42; Alliance for Community Media, et al. Comments at 28; NBC Comments at 6-7; New York City Comments at 8; U S West Comments at 19-20.

[381]NAB Comments at 13. *See also* NYNEX Comments at 18.

carry and PEG access channels.[382] Consistent with our conclusion that open video system operators be permitted to decide how best to meet the requirement that all subscribers receive must-carry and PEG access channels, we leave the decision of how to offer any necessary customer premises equipment to the open video system operator, including whether the open video system operator will offer it directly or require video programming providers to provide the equipment.

165. As ABC states, channel identity will also be just as important on open video systems as it is on cable systems, and as video options proliferate in the future, channel numbers will come to be thought of as "landmarks" on the various delivery systems, and thus will become ever more important.[383] Most commenters agree that our must-carry cable service regulations may be applied in a similar manner to open video systems.[384] We note that the statute requires the Commission to impose the cable service must-carry regulations to open video system operators "to the extent possible." Congress recognized that certain allowances may have to be made to adapt our must-carry rules to the technology and architecture of open video systems, much of which is evolving. An open video system operator therefore will be required to implement the channel positioning requirements contained in the must-carry rules in a manner as similar as possible to that of a cable operator, including for example, identifying broadcast stations on the same channels as their over-the-air channel numbers, or on a channel mutually agreed upon by the station and the operator.[385] We agree with the Assn. of Public Television Stations that, if a type of menu or gateway method is employed instead of traditional channels, the Commission may need to establish specific rules at a later date that protect the interests reflected in the channel positioning provisions.[386]

166. Consistent with the statutory requirement of comparable treatment, open video systems that span multiple television markets will be subject to the same must-carry and

[382]*See* State of New Jersey Ratepayer Advocate Comments at 7 (the State of New Jersey Ratepayer Advocate suggests that subscribers receiving both analog and digital signals through an open video system should be provided with any necessary equipment where additional equipment is required in a customer's premises for receipt of must-carry and PEG access channels).

[383]ABC Comments at 5-6.

[384]*See* Community Broadcasters Assn. Comments at 6; Assn. of Local Television Stations Comments at 6; NAB Comments at 12; NBC Comments at 4-5.

[385]As in the channel positioning context, discussed above, we will weigh heavily in any dispute whether the operator has employed available channel re-mapping techniques.

[386]Assn. of Public Television Stations Comments at 21. *See also* Assn. of Local Television Stations Comments at 7.

retransmission consent rules as cable systems that span multiple markets.[387] Generally, where a cable system spans multiple television markets, our rules give a cable operator a choice: the operator may provide all eligible broadcast stations to all subscribers, or it may configure its facility so that subscribers only receive the eligible broadcast stations in their market.[388] While one commenter suggested that we change our rules in light of the potentially larger size of open video systems,[389] we do not believe that there are sufficient technical or size differences between open video systems and large cable systems to warrant application of significantly different must-carry rules. We believe that application of similar must-carry rules in every relevant region served by a cable system or an open video system, will impose obligations on open video system operators that are "no greater or lesser" than those imposed on cable operators.

(2) Retransmission Consent

167. We find that our existing retransmission consent rules should also be applied to the distribution of programming over open video systems. These rules generally prohibit MVPDs from retransmitting the signal of a commercial broadcasting station without the station's express authority.[390] In the context of retransmission over a cable system, our rules clearly apply to the cable operator who is the only entity that distributes multiple channels of video programming over the cable system. Open video systems are designed to allow the operator and any video programming providers on the system to distribute the video programming they select. We believe that all such providers on a platform of this type that provide more than one channel of video programming qualify as MVPDs.[391] Section 602(13) defines an MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[392] Section 76.1000(e) of the Commission's rules defines an MVPD as "an entity engaged in the

[387] *See* Assn. of Local Television Stations Comments at 9; CATA Comments at 3-4; Continental Comments at 5-6; ABC Comments at 6-7; CBS Comments at 10; Time Warner Comments at 25; New York City Comments at 8-9; TCI Comments at 17-18; MPAA Comments at 14-15 (all supporting application of the cable rules in the open video context).

[388] *See* NBC Comments at 4 n.8; NAB Comments at 13; New York City Comments at 8-9; NYNEX Comments at 16-17; Viacom Comments at 21-22

[389] The Community Broadcasters Assn. stated that "because OVS will likely cover much greater areas (i.e., more than one Area of Dominant Influence ("ADI")) than current cable systems do, the rules as applied to OVS may wish to limit any broadcast station's must-carry rights to its Grade B contour." Community Broadcasters Assn. Comments at 6-7.

[390] 47 C.F.R. § 76.64; *see also* Communications Act § 325(b), 47 U.S.C. § 325(b).

[391] CBS Comments at 7

[392] Communications Act § 602(13), 47 U.S.C. § 522(13)

business of making available for purchase, by subscribers or customers, multiple channels of video programming."[393] Therefore, our retransmission consent rules will apply to any video programming provider on an open video system that provides more than one channel of video programming.[394] Given the inherent differences between cable systems and open video systems, we believe that the application of our retransmission consent rules in this fashion will impose obligations that are no greater or lesser than those imposed on cable operators.

168. As we stated, the open video system operator is charged with the responsibility for assuring that its system meets the requirements of our must-carry rules. We believe that it is appropriate as a matter of administrative efficiency that open video system operators receive all must-carry/retransmission consent election statements that broadcast stations are required to send under our retransmission consent rules.[395] However, open video system operators will not be responsible for making retransmission consent arrangements for all programming carried on the system. We agree with U S West's recommendation that once retransmission consent has been elected, broadcast stations should have to negotiate agreements with individual video programming providers on the open video system.[396] We require, therefore, that open video system operators promptly make all must-carry/ retransmission consent election statements received available to the programming providers on their systems.

169. Section 325(b)(3)(B) provides in relevant part: "If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."[397] Tele-TV argues that Section 325(b)(3)(B) should be applied to open video systems.[398] However, we agree with NAB that the potential size difference between open video systems and cable systems here warrants the adoption of different regulations.[399] As we have previously stated, Congress recognized that differences in the technology and architecture of open video systems might require that the Commission not adopt identical regulations but rather, adopt

---

[393]47 C.F.R. § 76.1000(e). Section 76.1000(e) also includes a specifically nonexclusive list of entities which qualify as MVPDs.

[394]CBS Comments at 7; U S West Comments at 20.

[395]*See* 47 C.F.R. § 76.64(h).

[396]U S West Comments at 20.

[397]Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B). *See also* 47 C.F.R. § 76.64(g) ("If one or more franchise areas served by a cable system overlaps with one or more franchise areas served by another cable system, television broadcast stations are required to make the same election for both cable systems.").

[398]Tele-TV Reply Comments at 11 n.10. U S West also argues that broadcasters should be required to make the same must-carry retransmission consent election "with all competing cable services providers (i.e. OVS operators and cable operators)." U S West Comments at 20.

[399]NAB Reply Comments at 3.

regulations that "to the extent possible" impose obligations that are no greater or lesser than those imposed on cable operators.[400] Large open video systems may serve numerous geographic areas that overlap multiple cable franchise areas. We believe that this size difference poses the potential that one open video system may overlap several cable systems that do not have overlapping franchise areas. Our current retransmission consent rules do not require that a broadcaster make the same election for cable systems serving franchise areas that do not overlap. As a result, it may not be possible for broadcasters to make the same election on overlapping cable and open video systems. Therefore, we will not require that broadcasters apply the same election to all cable and open video systems serving the same geographic area.

170. Finally, we note that the Commission does not intend to modify application of the cable compulsory copyright license or to affect existing or future programming licenses between video programmers and broadcasters when applying the cable must-carry and retransmission consent rules to open video systems. The Commissioner of Baseball, the MPAA and the NBA, et al. expressed concern regarding the effect of our retransmission consent rules on cable compulsory licenses in the open video system context.[401] However, we have previously recognized in the cable context that the signal retransmission rights created for broadcasters under Section 325(b)(1) are distinct from the interest a copyright holder may have in the programming contained in a particular signal.[402] Section 325(b)(1) creates a separate right in the broadcaster's signal that may be applied against cable systems or other MVPDs.[403] The cable compulsory license and existing and future programming licenses between video programmers and broadcasters all serve to protect the copyright holder's copyright interest in programming, while also allowing for distribution of such programming.[404] Section 325(b)(6) recognizes the distinction between these rights and makes clear that the retransmission consent rights created under this section will not modify application of the cable compulsory license or affect existing or future programming licenses between video programmers and broadcasters in the cable context. We believe that Section 325(b)(6) should have the same effect in the context of open video systems. This will clearly impose obligations that are no greater or lesser than those imposed through cable service regulation.

[400] *See supra* Section III.E.2.b.(1).

[401] Commissioner of Baseball Comments at 3-4; MPAA Comments at 15; NBA, et al. Comments at 3.

[402] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market*, 8 FCC Rcd 2965, 3004-05 (1993).

[403] *Id.*; Communications Act § 325(b)(1), 47 U.S.C. § 325(b)(1).

[404] 17 U.S.C. § 111.

3. Program Access

a. Notice

171. Section 653(c)(1)(A) provides that, among other things, Section 628 of the Communications Act and the Commission's rules thereunder, which govern the development of competition and diversity in video programming distribution ("program access")[405] in the cable television context shall apply to any operator of an open video system.[406] Moreover, the 1996 Act amended Section 628 to apply the provisions under that section to a common carrier or its affiliate that provides video programming by any means directly to subscribers.[407]

172. In enacting Section 628 as part of the 1992 Cable Act, Congress sought to promote competitive entry of programming distributors competing with cable operators by restricting certain conduct of cable operators and satellite programmers in which a cable operator has an attributable interest. This Congressional policy is embodied in Section 628 and the Commission's program access rules.[408] In general, the program access rules, as amended pursuant to the 1996 Act, prohibit cable operators, common carriers and their affiliates that provide video programming by any means directly to subscribers, satellite cable programming vendors in which a cable operator or such a common carrier or its affiliate has an attributable interest ("vertically integrated satellite programmers"),[409] and satellite broadcast programming vendors from engaging in unfair methods of competition. The rules also limit certain specified discriminatory conduct, including the use of exclusive contracts.[410] In addition, under the program carriage provision of the

[405] *See* Communications Act § 628, 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-76.1003.

[406] Communications Act § 653(c)(1)(A), 47 U.S.C. § 573(c)(1)(A).

[407] 1996 Act § 301(h). The Commission amended its rules to include the application of the program access rules to common carriers as provided in Section 628(j). *See* 47 C.F.R. § 76.1004.

[408] Communications Act § 628, 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-76.1004.

[409] Section 628(j) applies a different definition of attributable interest to common carriers than it does to other entities under the program access rules. In addition to the definitional exceptions contained in Section 76.1000(b) of our rules, 47 C.F.R. § 76.1000(b), two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite programming vendor. Communications Act § 628(j), 47 U.S.C. § 548(j); *see also Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking in CS Docket No. 96-85 (FCC 96-154, released April 9, 1996), at para. 48.

[410] *Id.* The program access rules require that complaints of discrimination involve discrimination between "competing distributors." *See generally* 47 C.F.R. §§ 76.1000-76.1003. The rules also provide procedures for resolving program access disputes. *See* Section III.G. hereof regarding application of the program access dispute resolution procedures to open video system disputes.

Communications Act,[411] competing distributors have standing to challenge exclusive arrangements that are the result of coercive activity.[412]

173. In the *Notice*, we sought comment on applying the program access rules to open video system operators, as required under the 1996 Act.[413]

b. Discussion

174. Based on the comments received and our reading of the statute, we believe that four general issues arise in the context of applying the program access rules to open video systems. The first concerns the extent to which the program access regime restricts the activities of open video system operators. The second pertains to how the program access regime restricts the conduct of open video system video programming providers. The third issue concerns the extent to which the benefits of the program access statute and rules apply to open video system video programming providers. The fourth issue raised by commenters involves certain expansions of our program access rules.

(1) Applicability of Program Access Rules to Open Video System Operators and Their Affiliates

175. Section 653(c)(1)(A) applies the program access provisions to open video system operators. Given this language, we conclude that the program access restrictions shall apply to the conduct of open video system operators in the same manner as they are currently applied to cable operators and common carriers or their affiliates that provide video programming directly to subscribers.[414]

176. Generally, we see two different ways to read Section 628 to apply to open video system operators. First, we could substitute "open video system" for "cable" throughout Section 628 and create parallel provisions for cable operators and open video system operators. Such an application of Section 628 to open video systems would restrict, for example, open video system operators from entering into exclusive agreements with satellite programming vendors in which an open video system operator has an attributable interest, but would permit open video system operators to enter into exclusive agreements with satellite programming vendors in which a cable

[411]Communications Act § 616(a)(2), 47 U.S.C. § 536(a)(2).

[412]47 C.F.R. §§ 76.1300-76.1302. See also Section III.E.5. below regarding the application of Section 616 to open video system operators.

[413]*Notice* at para. 61.

[414]*See* Telephone Joint Commenters Comments at 29; Cablevision Systems/CCTA Comments at 23; HBO Comments at 21; NCTA Comments at 35; National League of Cities, et al. Comments at 44; NYNEX Comments at 20; TCI Comments at 19; Telecom. Industry Assn. Comments at 4; USTA Comments at 20.

operator has an attributable interest. Alternatively, we could add "open video system operator" to the statutory language each time cable operator is referenced, yielding one provision for both types of operators. Under this scenario, open video system operators and cable operators would be restricted from entering into exclusive arrangements with each others' vertically integrated programming vendors. We do not believe that the latter type of exclusive contract is the type with which Congress was concerned.

177. As discussed below, one of Congress' primary concerns underlying the program access provisions was that cable operators (and now open video system operators) may use their ownership of or vertical integration with satellite programmers to exclude competitors from access to their programming. This concern does not exist with an open video system operator vis-a-vis a programmer vertically integrated with a cable operator. Nor does it exist with a cable operator vis-a-vis a satellite programmer in which an open video system operator has an attributable interest. Therefore, we believe it is most appropriate to apply Section 628 to open video system operators by creating parallel provisions for cable operators and open video system operators. Accordingly, open video system operators may, subject to Section 628(b)'s general prohibitions, enter into exclusive contracts with satellite programmers in which a cable operator has an attributable interest, and, likewise, cable operators may, subject to Section 628(b), enter into exclusive contracts with satellite programmers in which an open video system operator has an attributable interest.[415] We believe that the application of the program access rules to open video systems as described will, in addition to following the plain language of the statute, create a level playing field between open video system operators and cable system operators by permitting comparable access to vertically integrated satellite programming.

178. Specifically, the conduct of an open video system operator shall be subject to Section 628(b), which prohibits unfair methods of competition and unfair or deceptive acts or practices. In addition, the program access provisions which preclude certain specific conduct, including undue or improper influence, and discrimination in prices, terms or conditions,[416] shall apply to open video system operators as well.

179. Sections 628(c)(2)(C) and (D) as enacted by the 1992 Cable Act restrict cable operators from entering into exclusive agreements with programmers in which a cable operator has an attributable interest. We shall apply these limitations on exclusive contracts to open video system operators so that open video system operators will be generally restricted from entering into exclusive contracts with programmers in which an open video system operator has an attributable interest, not in which a cable operator has an attributable interest. Thus, any practice, understanding, arrangement or activity, including exclusive contracts, between an open video system operator and a satellite programmer vertically integrated with an open video system

[415]Similarly, a common carrier or its affiliate that provides video programming directly to subscribers will be generally restricted from entering into exclusive agreements with a satellite programmer in which a common carrier or its affiliate has an attributable interest.

[416]Communications Act § 628(c)(2)(A), (B), 47 U.S.C. § 548(c)(2)(A), (B).

operator that prevents an MVPD from obtaining such satellite programming in an area unserved by a cable operator as of the date of enactment of the 1992 Cable Act is *per se* unlawful.[417] Exclusive contracts between an open video system operator and a satellite programmer vertically integrated with an open video system operator which relate to an area served by cable as of the date of enactment of the 1992 Cable Act are prohibited unless the Commission first determines that such a contract is in the public interest in accordance with the factors set forth in Section 628(c)(2)(D).[418] Moreover, to implement fully the intent of Section 653, Section 628 and our rules shall apply to any affiliate established by an open video system operator to distribute programming on its system.

180. In applying the program access restrictions to open video systems, we also believe it is reasonable to include, within the definition of satellite cable programming, video programming which is satellite delivered and which is primarily intended for the direct receipt by open video system operators for their retransmission to open video system subscribers. Section 628 refers to satellite cable programming, and the definition of satellite cable programming is video programming, other than satellite broadcast programming, which is satellite delivered and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. We believe, however, that, in applying the provisions of Section 628 to open video system operators, Congress intended to include programming primarily intended for carriage on open video systems.[419] We will therefore insert a note in Section 76.1000(h) of our rules indicating that satellite open video system programming is included within the definition of satellite cable programming.

(2) Program Access Restrictions on Open Video System Programming Providers

181. The programming relationships that are likely to occur with respect to open video systems raise additional program access issues that are not raised by the programming relationships on cable systems. In the cable context, an agreement to carry programming is generally between a programmer and a cable operator. Restricting the activities of cable

[417] *Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359, 3383 (1993) ("*First Report and Order in MM Docket No. 92-265*"). In applying the distinction between unserved and served areas to open video systems, we will continue to consider an area unserved if it was unserved by a cable operator, as opposed to an open video system operator, as of the date of enactment of the 1992 Cable Act. Because open video systems are a creature of the 1996 Act, all areas would be considered unserved if we were to apply this provision to areas unserved by open video system operators as of date of enactment of 1992 Cable Act. To preserve Congress' distinction between unserved and served areas, we will continue to consider an area "unserved" if it was unserved by a cable operator as of October 5, 1992.

[418] Communications Act § 628(c)(2)(D), 47 U.S.C. § 548(c)(2)(D).

[419] *See also* National League of Cities, et al. Comments at 44 ("OVS-originated programming should be equally available to other competing video delivery systems.")

operators and satellite programmers vertically integrated with cable operators therefore addresses Congress' concern over cable operator control over video programming. In the open video system context, however, there may be many programmers providing packages of programming directly to subscribers. An agreement to carry programming may be between a programmer and an open video system operator or between a programmer that produces programming and one that will distribute it directly to subscribers through an open video system. Moreover, a video programmer may provide its own programming directly to subscribers by purchasing channel capacity on an open video system platform.

182. Rainbow claims that Congress limited the applicability of the program access rules to operators of open video systems, and that nothing in the 1996 Act suggests that programmers must provide their services to competing users of an open video system.[420] We believe, however, that, in order to effectuate the purposes of the program access statute in the open video context, as we believe Congress intended us to do by applying Section 628 to open video systems, open video system programming providers should be subject to the program access restrictions to the extent described below.

183. In *Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order in MM Docket No. 92-265 ("*DBS Order*"),[421] the Commission determined that, in the DBS context, in order for an exclusive contract to be prohibited under Section 628(c) of the Communications Act and Section 76.1002(c) of our rules, the contract must be between a cable operator and a vertically integrated satellite programmer. In the *DBS Order*, the Commission denied a petition to include exclusive contracts between a DBS operator and two vertically integrated satellite cable programmers (that were both unaffiliated with the DBS operator) within the *per se* prohibition of Section 628(c)(2)(C).[422] The Commission's denial of the petition was based on the legislative history of the 1992 Cable Act, which was focused on concerns over exclusive arrangements of cable operators, the language of Section 628(c), and the fact that the exclusivity arrangements were limited to a single orbital slot.[423] The Commission noted, however, that in declining to broaden its rules, it did not preclude the petitioner or any other aggrieved party from seeking

[420]Rainbow Comments at 28; *see also* Cablevision Systems/CCTA Comments at 23-24 (expressing concern that the application of the program access rules to open video systems should not dilute the rights of programming producers, vendors, and other entities responsible for programming content to exercise control over their products); TCI Comments at n.61 (asserting that the program access rules should not be interpreted to supplant the right of a programmer to request channel capacity on an open video system or to determine the manner in which its programming is to be provided).

[421]10 FCC Rcd 3105 (1994).

[422]*See id.*

[423]*Id.* at 3123-3126.

relief from such contracts through other appropriate provisions of Section 628.[424]

184. Thus, under the *DBS Order*, a vertically integrated satellite programmer is not generally restricted from entering into an exclusive contract with an MVPD that is not affiliated with a cable operator, although such a contract remains subject to case-by-case review under Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules.[425] Consistent with the *DBS Order*, in the context of open video systems, a vertically integrated satellite programmer will not be *per se* precluded from selling its programming exclusively to one MVPD on an open video system, as long as that MVPD is not affiliated with the same type of operator (i.e., a cable operator, a common carrier providing video programming directly to subscribers or an open video system operator) as the vertically integrated satellite programmer.[426] Similarly, cable operators, common carriers providing video programming directly to subscribers and open video system operators are not generally restricted from entering into exclusive contracts with non-vertically integrated programmers. Nonetheless, as we found in the *DBS Order*,[427] our finding herein does not preclude an aggrieved party from seeking relief in an appropriate case under other provisions of Section 628 and the Commission's rules thereunder.

185. Moreover, while not explicitly discussed in the *DBS Order*, we also do not intend to foreclose challenges to exclusive contracts between vertically integrated satellite programmers and MVPDs, including unaffiliated MVPDs, on open video systems under Section 628(c)(2)(B), which prohibits, with limited exceptions, discrimination among competing MVPDs by a vertically integrated satellite programmer.[428] In particular, as we found in the *First Report and Order in MM Docket No. 92-265*, Section 628(c)(2)(B) covers non-price discrimination such as an

[424] *Id.* at 3121.

[425] *See id.* at 3125-3127.

[426] We believe this situation is analogous to USSB's agreements with Time Warner and Viacom which provided USSB with exclusive rights to HBO and Showtime only with respect to DBS distributors at the 101 degrees West Longitude orbital location. *Id.* at 3110. Like the contracts at issue in the *DBS Order*, exclusive contracts between a vertically integrated programmer and an unaffiliated MVPD on an open video system may promote competition between MVPDs by permitting one MVPD to distinguish its service from that of another MVPD. *See id.* at 3126.

[427] *Id.* at 3121, 3126-3127, *citing First Report and Order in MM Docket No. 92-265*, 8 FCC Rcd at 3374.

[428] One of the exceptions where discrimination "shall not be prohibited" is where the satellite programmer has entered "into an exclusive contract that is permitted under subparagraph (D) [Section 628(c)(2)(D)]." Communications Act § 628(c)(2)(B)(iv), 47 U.S.C. § 548(c)(2)(B)(iv). We interpret this provision as providing a safe harbor from challenge under Section 628(c)(2)(B)'s discrimination prohibition to exclusive contracts that the Commission has determined to be in the public interest under Section 628(c)(2)(D). We do not see this provision as applying to exclusive contracts that do not involve a cable operator (and now an open video system operator or common carrier providing video programming directly to subscribers), and are therefore not within the purview of Section 628(c)(2)(D).

unreasonable refusal to deal,[429] including one which might result from an exclusive contract. We also determined that the reasonableness of such refusals to deal will ordinarily be judged using applicable antitrust principles.[430]

186. The above discussion does not, however, resolve the applicability of the program access rules to exclusive arrangements between satellite programmers in which a cable operator has an attributable interest and open video system programming providers in which a cable operator has an attributable interest. We believe that, in order to further the purposes of the program access rules and statute, we must extend the current program access rules to apply to these arrangements in the open video system context. As the Commission stated in the *First Report and Order in MM Docket No. 92-265* and in the *DBS Order*, we believe that Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives "should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[431] In addition, we note that Section 628(c), the statutory provision under which the current regulations were adopted, is entitled "Minimum Contents of Regulations," which we infer to mean that Congress did not intend to limit the Commission to adopting rules only as set forth in that statutory provision.[432]

187. As stated above and in the *DBS Order*, in order for an exclusive contract to be prohibited under Sections 628(c)(2)(C) and 628(c)(2)(D) of the Communications Act and Section 76.1002(c) of the Commission's rules, the exclusive agreement must involve a cable operator (or, following the 1996 Act, a common carrier or its affiliate that provides video programming directly to subscribers, or an open video system operator). We will apply the program access rules under Section 628 to exclusive contracts between a satellite programmer in which a cable operator has an attributable interest ("cable-affiliated satellite programmer") and an open video system video programming provider in which a cable operator has an attributable interest ("cable-affiliated open video system programming provider"). Specifically, such exclusive contracts will be prohibited unless the contract pertains to an area served by a cable operator as of the date of the enactment of the 1992 Cable Act and the Commission first determines that the exclusive arrangement is in the public interest under the factors listed in Section 628(c)(4). Two types of cable-affiliated satellite programmer/cable-affiliated open video system programming provider

[429] *First Report and Order in MM Docket No. 92-265*, 8 FCC Rcd at 3412.

[430] *Id.* at 3413. The antitrust laws typically analyze such exclusive dealing arrangements under a "rule of reason" analysis, which addresses the extent to which the restraint will have an anticompetitive effect in any relevant market. *See, e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Advanced Health-Care Servs. v. Radfor Community Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478-79 (7th Cir.), *cert. denied.*, 488 U.S. 852 (1988).

[431] *First Report and Order in MM Docket No. 92-265* at 3374; *DBS Order* at 3126-3127.

[432] *See* Communications Act § 628(c), 47 U.S.C. § 548(c); *First Report and Order in MM Docket No. 92-265* at 3370.

relationships will be affected by this restriction on exclusive contracts. First, this rule will preclude a cable-affiliated satellite programmer from entering into an exclusive contract to provide its own programming to a cable-affiliated open video system programming provider with which the programmer is affiliated. For example, assume one of the open video system programming providers offering services on the open video system is Red Provider, which provides national and regional video programming to subscribers of cable and other multichannel video delivery systems. Red Provider is a wholly-owned subsidiary of Cablecolor, a large national cable company. Included among Red Provider's various programming services is the Yellow Channel. Under the rules adopted herein, absent prior Commission approval, the Yellow Channel may not enter into an exclusive contract with Red Provider, whereby the Yellow Channel agrees that Red Provider is the only open video system programming provider to which the Yellow Channel will be made available. Second, the new rule will preclude, absent prior Commission approval, a cable-affiliated satellite programmer from entering into an exclusive contract to provide its programming to an open video system programming provider that is affiliated with another cable operator. Using our example above, the Yellow Channel is not only precluded from entering into an exclusive agreement with Red Provider, but also may not enter into an exclusive agreement with the View Channel, a programming service that is an affiliate of another cable operator, Cableview.

188. We believe that subjecting these types of exclusive contracts to prior Commission review is necessary to fulfill the objectives of the program access rules in the open video system context. The program access requirements have at their heart the objective of releasing programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.[433] This concern remains when the cable operator (or its affiliate) is providing programming as a video programming provider on an open video system.

189. In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public.[434] The legislative history of Section 628 demonstrates Congress' deep concern with the cable industry's "stranglehold" over programming through exclusivity and the market power abuses exercised by cable operators and their affiliated programming suppliers that deny programming to non-cable technologies.[435] Cable

[433] *See First Report and Order in MM Docket No. 92-265*, 8 FCC Rcd at 3365.

[434] *See First Report and Order in MM Docket No. 92-265*, 8 FCC Rcd at 3362.

[435] *See DBS Order* at 3123-3124, *citing*, among other statements of various representatives, 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart) ("they [cable industry] know that if they maintain their stranglehold on this programming, they can shut down competition--even the deep pockets of the telephone companies for a decade or more."). *See also First Report and Order in MM Docket No. 92-265*, 8 FCC Rcd at 3370, *citing* 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (Rep. Tauzin) (the legislative history of Section 628

operators continue to have significant interests in programming, controlling 51% of all national satellite delivered programming services.[436] Of the top 15 services by prime time rating, 11 are vertically integrated with cable operators.[437] Moreover, while there has been competitive entry over the last few years, cable operators still serve about 91% of MVPD subscribers nationwide. At the same time, there has been significant consolidation in the cable industry, with the industry going from a relatively unconcentrated industry to one that can be characterized as well into the moderately concentrated range.[438] For example, from 1990 to 1995, assuming consummation of transactions announced at the time the *1995 Competition Report* was released, the percentage of subscribers nationwide served by the top ten multiple system operators ("MSOs") increased from 61.6% to almost 80%, and the percentage of subscribers nationwide served by the top five MSOs increased from less than 49% to more 66.6%.[439] This increase in concentration is significant in this context both because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct.

190. Our primary concern is that exclusive arrangements among cable-affiliated open video system programmers and cable-affiliated satellite programmers may serve to impede development of open video systems as a viable competitor to cable to the extent that popular programming services are denied to open video system operators or unaffiliated open video system programmers that seek to package such programming for distribution to subscribers. This is particularly so where the cable affiliated open video system programming provider has interests in a significant number of programming services, or the cable affiliated open video system programming provider is able to obtain exclusive contracts from a number of different cable affiliated satellite programmers, such that access to a substantial number of services is foreclosed.

191. As Congress recognized in enacting the program access provisions of the 1992 Cable Act, cable operators have the incentive to impede the development of other technologies into a robust competitor to incumbent cable systems.[440] We believe that, in applying the program access provisions to open video systems in the 1996 Act, Congress recognized that cable operators may use their control over programming to further this objective with respect to open

---

demonstrates Congress' concern that vertically integrated programmers may control programming access in areas where they are not commonly owned with the particular cable operator).

[436]Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market For the Delivery of Video Programming), Second Annual Report, CS Docket No. 95-61, FCC-491, 11 FCC Rcd 2060, 2132 (1996) ("*1995 Competition Report*"). TCI alone holds interests in 30% of national programming services, and Time Warner, 14%. *Id.* at 2133-34.

[437]*Id.*

[438]*Id.* at 2183 (Table-G-3).

[439]*Id.*

[440]Communications Act § 628, 47 U.S.C. § 548.